No. 85-1342

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHICAGO PARK DISTRICT, *et al.*,

Petitioners,

v.

SILAS J. ALEXANDER, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. THE ARGUMENTS RAISED IN ALEXANDER'S BRIEF IN OPPOSITION EVINCE THE CONFUSION IN THE STATE OF THE LAW WHICH MILITATES IN FAVOR OF REVIEW BY THIS COURT 2

A. Introduction 2

B. Both Alexander And The Seventh Circuit Erroneously Interpret This Court's Leading Decisions Narrowly And In Isolation 3

II. CONCLUSION 7

TABLE OF AUTHORITIES

Cases

	PAGE
Brown v. General Services Administration, 425 U.S. 820 (1976)	2,5
Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366 (1979)	2, 3, 4
Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981)	2, 4, 5, 6
Smith v. Robinson, ____ U.S. ____, 104 S.Ct. 3457 (1984)	2, 5, 6
Trigg v. Fort Wayne Community Schools, 766 F.2d 299 (7th Cir. 1985)	2, 3, 6

Statutes

42 U.S.C. § 1981	4
42 U.S.C. § 1983	3, 4, 5
42 U.S.C. § 1985(3)	3
42 U.S.C. §§ 2000e to 2000e-17	3, 4, 5

Other Authorities

S.Rep. No. 92-414 92d Cong., 2d Sess.[81] *reprinted in* [1972] U.S. Code Cong. & Ad. News 3668	4

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Petitioners Chicago Park District, Edmund Kelly, Patrick O'Malley, Theodore Jones, Jean Foran, Sydney Marovitz, Iola McGowan, Raymond F. Simon, William Bartholomay and John McHugh (collectively "Park District") respectfully submit the following reply to the Brief in Opposition to the Park District's Petition for Certiorari submitted by Respondents ("Alexander").

I.

THE ARGUMENTS RAISED IN ALEXANDER'S BRIEF IN OPPOSITION EVINCE THE CONFUSION IN THE STATE OF THE LAW WHICH MILITATES IN FAVOR OF REVIEW BY THIS COURT

A. Introduction

In its Petition for Certiorari, the Park District discussed the Seventh Circuit's misapplication and lack of consideration of this Court's four most analogous recent decisions. The Park District briefly analyzed the holdings and reasoning of and the interplay among this Court's decisions in *Middlesex County Sewerage Authority v. National Sea Clammers Association ("Sea Clammers")*, 453 U.S. 1 (1981), *Smith v. Robinson*, ___ U.S. ___, 104 S.Ct. 3457 (1984), *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979), and *Brown v. GSA*, 425 U.S. 820 (1976). Since the issue presented in the Park District's Petition has never been decided by this Court, the importance of these cases which faced similar questions is clear.

Alexander begins his response by boldly asserting, in his own distortion of the question presented for review, that this Court has already decided the issue in Alexander's favor (Alexander Br. i). Alexander's brief, however, nowhere indicates when or in what case this issue has been decided. Rather, Alexander's brief engages in the same type of narrow consideration of this Court's leading authority as that done by the Seventh Circuit in *Trigg v. Fort Wayne Community Schools*, 766 F.2d 299 (7th Cir. 1985).[1] Alexander's narrow views of this Court's leading cases evince the confusion in the state of the law on the present issue which is the very reason why review by this Court is necessary and appropriate.

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[1] As noted in the Park District's Petition for Certiorari, the Seventh Circuit's reversal of Counts II and IV in this case is based almost exclusively on *Trigg*, which was decided by the Seventh Circuit while this case was pending before it. The circuit court opinion in this case does not make an independent analysis of the issue presented here.

B. Both Alexander And The Seventh Circuit Erroneously Interpret This Court's Leading Decisions Narrowly and In Isolation

Alexander and the Seventh Circuit in *Trigg* have viewed the leading decisions of this Court in isolation, arguing that the holding in each case should be limited to the specific facts presented. Both Alexander and the Seventh Circuit have also focused on isolated aspects of the Supreme Court decisions to support their position. As a result, they have both completely overlooked the broad significance of those cases and their direct application to the present issue.

An example of the inappropriately narrow approach taken by Alexander is his treatment of *Novotny*. He begins with the invalid premise that the Park District is arguing that *Novotny* "limits state and local government employees to Title VII as a means of redressing racial discrimination in employment" (Alexander Br. 4). The Park District has made no such argument. What the Park District does argue is that *Novotny* contains many parallels to the present case, and that this Court's analysis of related issues in *Novotny* has an important bearing on the resolution of this case (Pet. for Cert., 16-18). Moreover, the Park District does not characterize *Novotny* as a controlling decision. Rather *Novotny* is one of several recent decisions of this Court which enunciate limitations on the use of older Civil Rights Acts which conflict with newer, more specific federal remedies. Alexander nevertheless characterizes *Novotny* as a narrow holding (Alexander Br. 4). He attempts to distinguish the decision by claiming that a footnote in *Novotny* instructs that Sections 1983 and 1985(3) are to be afforded fundamentally different treatment despite their many similarities (Alexander Br. 5, 7). That argument is both false and illogical, as the footnote merely distinguishes *Novotny* from two older decisions of the Court, neither of which involved Section 1983 or Section 1985(3). *Novotny*, 442 U.S. at 377, n.21.

In his zeal to distinguish *Novotny*, Alexander has even attempted to rewrite his complaint in his brief. Alexander claims that he has alleged not only due process violations, but also violations of the Thirteenth Amendment and of "the right of black citizens to contract without impairment," the latter allegedly asserted under 42 U.S.C. § 1981 (Alexander Br. 6). These claims are not alleged in any count of the Fourth Amended Complaint or in any other count of any other complaint ever filed in this case by Alexander.

The confusion underlying Alexander's approach to this Court's prior decisions is even more evident in his attempt to distinguish *Sea Clammers*. Alexander states that in *Sea Clammers* the Court supposedly held that a Section 1983 remedy was unavailable because "the *legislative history* of the environmental statute at issue there (unlike that of Title VII) makes clear that Congress intended plaintiffs suing thereunder to be limited exclusively to the remedies set forth in those statutes." (Alexander Br. 12) (emphasis in original). Later in his brief, Alexander refers to a footnote in *Sea Clammers* which he asserts supports this statement (Alexander Br. 15).

In fact, as the Park District underscored in its Petition for Certiorari, the legislative history of *Sea Clammers* indicates just the opposite of what Alexander contends. (*See* Pet. for Cert. 13-14). The footnote in *Sea Clammers* cited by Alexander refers to a Senate Report which states that the new statute "would specifically preserve any rights or remedies under any other law." S.Rep. No. 92-414, 92d Cong. 2d Sess. 81, *reprinted in* [1972] U.S. Code Cong. & Ad. News 3668, 3746. *Sea Clammers* was decided as it was *despite* legislative history apparently to the contrary, not because of the legislative history as Alexander claims.

Alexander's sole argument in opposition to the Park District's Petition for Certiorari is his claim that Title VII legislative history controls the present issue to the exclusion of

all other considerations. He therefore has narrowly focused his own discussion of this Court's previous decisions to place undue emphasis on any discussion of legislative history in the opinions. He thus extolls the *Sea Clammers* legislative history, which actually undercuts his argument that this Court considers legislative history to be the controlling factor in determining the intent of Congress. Alexander also overstates the importance of legislative history in the *Smith v. Robinson* and *Brown v. GSA* decisions. (*See* Alexander Br. 15.) Contrary to Alexander's argument, however, legislative history was not "the dispositive factor" in either case. In *Brown v. GSA*, the Court did look at the legislative history of Title VII, but did so with the specific purpose of determining what Congress' perception of the prior state of the law was, 425 U.S. at 828, and not to find a way to contravene what the statute itself provides as Alexander is advocating in his brief. The Court in *Brown v. GSA* was also quick to point out that the structure of the statute and the legislative history were completely consistent with one another. 425 U.S. at 829. In *Smith v. Robinson*, as in *Sea Clammers*, a statement in the legislative history intimated that other remedies were *not* pre-empted by the new legislation. The Court concluded that Congress intended to pre-empt the prior inconsistent remedy despite that language. 104 S.Ct. at 3470.

The structure and language of Title VII at issue here strongly militate against the position taken by Alexander. Congress did not intend that state or local government employees are free to chose whether or not they will subvert Title VII by proceeding directly into court by designating their pleading as a Section 1983 claim. Using the approach enunciated by this Court in *Sea Clammers*, it is readily apparent that Congress has indicated its intent to pre-empt Section 1983 under the particular circumstances at issue here by providing a detailed and comprehensive remedy in Title VII.

Alexander's gross inflation of the significance of this Court's considerations of legislative history is a transparent attempt to distract this Court's attention from the more significant aspects of those decisions of the Court which have the most direct bearing on this case. Those decisions, when viewed together, reveal that the Seventh Circuit's decisions in this case and in *Trigg* were erroneous. *Smith v. Robinson* and *Sea Clammers*, neither of which was addressed by the Seventh Circuit, strongly indicate that plaintiffs may not subvert Title VII's comprehensive scheme by simply labelling their claim as one to redress a constitutional deprivation. This Court should grant the Park District's Petition so that the confusion that remains among lower courts and litigants over how this Court's analogous decisions apply to the present issue can be eliminated.

II.

CONCLUSION

The issue presented in the Park District's Petition is far from settled. As the Park District demonstrated in its Petition, the precise issue presented here has arisen in many reported lower court cases in the last few years with directly conflicting results. *See* Pet. for Cert. 22-25. Although Alexander attempts to inflate a footnote from a Fifth Circuit decision and vague dictum from the Sixth Circuit into overwhelming authority in his favor (Alexander Br. 11), there is no consensus on this issue. A review of the issue by this Court would settle an important question of federal law which is likely to be faced frequently by the lower courts. The Park District respectfully requests that its Petition be granted.

Respectfully submitted,

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